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113 I.A. 2nd 89

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
HERMAN ROBINSON, Defendant-Appellant.	)	COOK COUNTY.
	)	HON. HARRY S. STARK, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the crime of murder and was sentenced to a term of fourteen years to twenty years in the penitentiary. On this appeal he contends that he was not proven guilty beyond a reasonable doubt.

People's witness, John Eadon, testified that at approximately 6:30 P.M. on March 22, 1965, he entered a cocktail lounge on South Kedzie Avenue in Chicago. He stopped in the front portion of the lounge for a few minutes, during which time he consumed a bottle of beer and engaged in a conversation with a friend, Walter Haney, the deceased. Eadon testified that he then went to the rear of the establishment where he consumed another bottle of beer and again engaged in a conversation with another friend.

Approximately 7:15 or 7:30 P.M. he heard noises coming from the front of the lounge and saw patrons running out the front door. Eadon walked to the front of the lounge and observed the defendant, a man named Willie Marbles, and Walter Haney engaged in a fight. Defendant and Marbles each had a knife in one hand and, with the other hand, they were holding onto Haney's arms. Eadon testified that Haney was struggling to free himself from their grasp, and further testified that he observed no weapon in Haney's hands.

The witness testified that he observed defendant strike Haney "somewhere down on the back" with his knife, but stated that he was unable to recall whether Marbles struck Haney with his knife. Haney died as the result of a stab wound to the heart.

Eadon further testified that defendant and Marbles released

Haney, and that Marbles then went after the witness with the knife, cutting him on the neck. The bartender, deceased at the time of trial, stopped the latter attack. Defendant was arrested shortly thereafter by police officers.

It was stipulated between the People and the defendant that, if called as a witness, the coroner's pathologist would testify that the cause of Haney's death was a stab wound in the heart, which the toxicologist's report, also stipulated, showed was inflicted from the chest area of the body. Defendant offered no testimony in his own behalf.

Defendant's attack on the credibility of John Eadon, on the grounds that it was improbable, unconvincing and contrary to human experience and that it was false with respect to the fatal wound suffered by the deceased, finds no support in the record.

Eadon testified that while he was in the rear of the lounge, he heard noises coming from the front of the lounge and observed the patrons running out the front door. He walked to the front of the establishment where he observed defendant and Marbles, each armed with a knife and each holding one of Haney's arms; Haney was attempting to free himself and the witness did not see a weapon in his possession. Eadon further testified that he observed defendant strike Haney in the back with the knife. The coroner's pathologist's report and the toxicologist's report showed Haney to have received some nine stab wounds about the upper portion of the body, one of which was in the back and the fatal one, which was in the chest. The credibility of the witnesses and the weight to be given to their testimony are matters to be determined by the trier of fact. People v. Wollenberg, 37 Ill. 2d 480, 484. The jury undeniably found John Eadon a credible witness, and we cannot say from the record that his testimony is improbable, unreasonable or unsatisfactory, as is necessary to set aside that determination. People v. Hansen, 28 Ill. 2d 322, 332.

Defendant raises the argument that the evidence shows that the fatal stab wound was inflicted in the chest area of the body and that therefore Eadon's testimony that he saw defendant stab Haney in the back is unbelievable. The fact that Haney may have died from a stab wound inflicted from the front has no bearing on the credibility of Eadon's testimony that he observed defendant stab Haney in the back. The toxicologist's report showed that Haney's body bore a laceration in the back, substantiating Eadon's testimony in this regard. Further, the fatal wound could have been inflicted by either defendant or Marbles prior to the time Eadon arrived at the front of the lounge and first observed the fight, which was already in progress. Defendant and Marbles acted in concert in the assault and were equally accountable for Haney's death regardless of which one inflicted the fatal wound.

Defendant further contends that since there is no evidence as to how the fight between the three men arose, defendant at most was guilty of manslaughter.

A conviction for murder will stand where the evidence shows that the defendant voluntarily and wilfully committed an act, the natural and direct tendency of which was to take another's life; the intent is implied from the nature of the act. People v. Davis, 35 Ill. 2d 55, 61. The intent to kill another may be inferred by the vicious character of an attack as well as by the use of a deadly weapon. People v. Allum, 78 Ill. App. 2d 462, 465; People v. Smith, 71 Ill. App. 2d 446, 454.

The evidence showed that both defendant and Marbles had knives during the fight; that the two men held Haney's arms during the fight, thereby incapacitating him; that Haney, who was without a weapon, was struggling to free himself from their grasp; that defendant stabbed the deceased in the back; and that Marbles pursued and used his knife on Eadon after defendant and Marbles were finished with Haney. The pathologist's report showed that Haney

was stabbed no less than nine times during the struggle. The viciousness and willfulness of the attack on unarmed Haney cannot be denied.

[1] Defendant and Marbles acted in concert and both are equally guilty of Haney's death. There was no evidence of any provocation on Haney's part, and speculation by the defendant that the fight was the result of intense passion is not supported by the record. There is nothing in the record which would support a manslaughter verdict. The circumstances of the killing, as testified to by Eadon and as evidenced by the pathologist's and toxicologist's reports, support the murder verdict returned by the jury.

A final matter mentioned by defendant, but not argued in his brief on appeal, is that the sentence imposed is excessive. This point has been waived for failure to argue to issue. Supreme Court Rule 341(e)(7); Ill. Rev. Stat. 1967, Chap. 110A, Para. 341(e)(7). Furthermore, the nature of the crime committed by the defendant, and his past record of convictions support the sentence imposed.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

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52912

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. LEE BATIE, JR., Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE JOHN C. FITZGERALD Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Lee Batie, Jr., defendant, was indicted for burglary. After a plea of not guilty, the defendant's case was tried before a judge without a jury; he was found guilty and sentenced to the Illinois State Penitentiary for not less than five nor more than fifteen years. On appeal defendant presents the following issues:

1) Was defendant proved guilty beyond a reasonable doubt.

2) Was the sentence unduly severe.

On July 23, 1966, the restaurant owned by Steve Quintas at 1459 North Ogden Avenue, Chicago, was broken into in the late evening. When the owner closed the restaurant at about 8:00 p.m., he had secured a deadlock bolt and placed a bar across the rear door. Nothing was taken from the restaurant, but merchandise was scattered around inside.

Joseph Valenti, a Chicago police officer, was one of four officers who answered a radio call and went to the restaurant in question at about 11:45 p.m., on July 23, 1966. Officer Valenti testified that he saw two men come out of the back door and run along the side of the building. He identified the two as the defendant and Louis Stovall.

He announced that they were police officers and ordered them to halt. When Valenti's partner fired two warning shots in the air Stovall stopped, and the defendant kept running, but was apprehended and the two men were arrested. Valenti did not lose sight of the two men during this time.

Officer Valenti further testified that there were fresh gouge marks inside the restaurant door; paint and wood were chipped away, and inside the building merchandise was scattered all around. This latter evidence was substantiated by Officer Pike.

The officers testified that a report had come over the police radio that there were three men and that one was armed with a shotgun. There were only two men, however, and no shotgun was located. A pry-bar was found near the door where the paint and wood were chipped.

Officer Pike testified that he was in the other squad car; that he pulled in front of the building and saw two men running from the back door area and he heard two shots fired. He identified the two men as Stovall and the defendant. He also testified that the back door had been pried open and that boxes and merchandise were in disarray inside the building. He stated that a tire iron was found near the rear door.

Police Officer Reckweg, who was in the squad car with Officer Valenti, testified that Stovall and the defendant came out of the back door of the restaurant as the police car was pulling up.

Stovall testified in his own behalf that on the night in question he was with the defendant; that he was on his way to his brother's house on Division Street;

that he and the defendant had bought some wine and had stopped in the alley behind the restaurant to drink the wine. He stated that he heard the sound of running and was afraid there might be trouble similar to a fight he had previously had in that vicinity; that he heard two shots, but did not hear anyone tell them to halt. He stated that he heard one of the officers tell the defendant to drop the package, and that the bottle of wine broke when the defendant dropped it. He testified that neither he nor the defendant had been in the restaurant or had run out of it, and that he had never seen the crowbar before. On cross-examination he testified that he saw the defendant on the elevated train, and the defendant suggested they get off the train and buy some wine. The witness was somewhat confused about the route he proposed to take to reach his brother's house; he said he was not familiar with the streets. He further testified that he did not notice whether the back door of the restaurant was open or closed.

The defendant confirmed Stovall's testimony regarding their meeting on the train, purchasing the wine, and stopping in the alley to drink it. He testified that he did not damage the door, nor did he break into the restaurant. Explaining his presence in the area, he stated that he was looking for one of his brothers "around Larrabee, Division, around North Avenue and Clybourn, all around that area, the taverns and places like that." He stated that he paid no attention to the restaurant door when he was behind it; that he could see a light in the back of the restaurant at the time the police officer took him there, but had not seen a light there before.

The defendant argues that the evidence was insufficient inasmuch as the police found no third man and no shotgun; that the police officers did not have sufficient time to identify the two men they saw coming out of the back door of the restaurant. He also argues that the time element between 9:30 p.m., when he and Stovall boarded the train, until the defendant was arrested at 11:45 p.m., was satisfactorily accounted for. In his brief it is stated:

> From the evidence it is easy to draw the permissible inference that they blundered and walked from Fish's or Fisher's Tavern to Ogden, which they then followed stupidly but understandably, back in a southwestern direction to Clybourn, thus losing much time. This is what a person not familiar with that neighborhood might very well do.

The defendant further argues that it is utterly unfair to characterize his testimony as evasive or perjured; and that there could be a reasonable doubt that the police officers could have identified the defendant under the circumstances. However, that brings before us the question of a determination by the trial court of conflicting evidence. The rule is clear that it is the duty of the trier of fact to weigh and assess the credibility of the witnesses. People v. White, 63 Ill. App. 2d 105; People v. Hill, 61 Ill. App. 2d 16. It is also equally well settled that where a question of the credibility is presented because the defendant's testimony contradicts that of the State's witnesses, a reviewing court will not disturb the trial court's finding. People v. Scott, 20 Ill. 2d 324. And in People v. Lobb, 17 Ill. 2d 287, the court said at page 294:

> "Where the evidence is conflicting, the credibility of the witnesses and the weight to be given their testimony is a question for the jury or for the trial court, if the case is tried without a jury, and this court will not substitute its judgment for that of the jury or trial court."

The defendant further argues that the State did not prove its case except by circumstantial evidence. A burglary conviction can be sustained on circumstantial evidence. People v. Brown, 27 Ill. 2d 23; People v. Bremer, 57 Ill. App. 2d 436. Intent is ordinarily proved by circumstantial evidence and inferences drawn therefrom. In People v. Johnson, 28 Ill. 2d 441, the court said at page 443:

> "Intent must ordinarily be proved circumstantially, by inferences drawn from conduct appraised in its factual environment. We are of the opinion that in the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary."

It is not necessary in a burglary case to allege or prove that anything was taken. People v. Gooch, 70 Ill. App.2d 124.

In the instant case the defendant's flight was inculpatory. According to the testimony of Officer Reckweg, both defendant and Stovall knew that they were police officers. They were ordered to halt, and warning shots were fired; under these circumstances, the flight was certainly incriminating and was a circumstance which could be considered by the trier of fact, in connection with all the other evidence, as tending to prove guilt. People v. Forrest, 99 Ill. App. 2d 349.

The fact that no burglary tools were found on the defendant was not important; a bar was found, and the rule is that where burglary tools are found in and about the premises they are admissible in evidence even though no witness is able to place them on the defendant's person. People v. Craddock, 30 Ill. 2d 348; People v. Bryan, 27 Ill. 2d 191.

The court could properly hold that the explanation given by the defendant and Stovall of their presence at the scene was not reasonable, and that the defendant could be judged by the improbabilities of their stories. People v. Forrest, supra. The evidence was sufficient to remove any reasonable doubt of defendant's guilt.

The defendant also argues that the sentence of five to fifteen years imposed upon him was unduly severe, and that there was no evidence that any property was taken. In his brief he says: "Not one bit of property was found missing. The only property damage found was to a door." It is well understood that the time of a sentence for burglary is not based upon property loss. It is clear that under the statute the offense of burglary is complete when a person without authority enters a building with intent to commit a felony or theft. No further proof is necessary.

In his brief the defendant further argues that in 1958 [eight years earlier] he had been sentenced from three to fifteen years in the penitentiary on a charge of armed robbery; he was paroled in October 1965, with the parole due to expire June 1966. In his defense he points out that there were other matters not gone into by the trial judge, such as family background, education and work record; and defendant had filed a supplemental record which was before the trial judge at the time of sentencing. A review of that report would indicate that the sentence fixed by the trial court was proper. The defendant did not rehabilitate himself either during the time he was imprisoned or while he was on parole.

In People v. Taylor, 33 Ill. 2d 417, the court laid down the rule that the power granted to reviewing courts

to reduce sentences should be used with caution and circumspection. The reason was that the trial court, having seen and heard the witnesses, was in a better position to impose sentence. Also see People v. Hobbs, 56 Ill. App. 2d 93. Unless there is a clear abuse of discretion the reviewing courts will not disturb the penalty fixed by the trial court. People v. Bonner, 37 Ill. 2d 553. Nor is People v. Lillie, 79 Ill. App. 2d 174, cited by defendant, persuasive under the facts shown by the record before us.

In People v. Brown, 60 Ill. App. 2d 447, the court said at page 449:

> "We agree with defendants' contention that the purpose of modern-day penology is the rehabilitation of the offender. The sentence to be imposed is that which has the greatest potential of restoring the offender to a useful and productive place in society. At the same time, however, the public must be protected."

In the case before us it cannot be said that the defendant by his past performance would be capable of rehabilitation in a short time. The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

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53262

JOHN A. ROTH, GEORGE ROTH, UNITED CONSUMERS SERVICE and SUPPLY CO., and LA SALLE NATIONAL BANK, as trustee under Trust No. 10101, Plaintiffs-Appellees, vs. THE CITY OF PARK RIDGE, a municipal corporation of the State of Illinois, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE JOHN J. LUPE Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The plaintiffs commenced a declaratory judgment action challenging the constitutional validity of certain portions of the 1928 Zoning Ordinance as amended of the City of Park Ridge, Illinois, in its application to the plaintiffs' properties. The case was tried before the court without a jury and the court entered a final judgment order in favor of plaintiffs. This appeal is taken from that judgment.

In this court the defendant urges that the said zoning ordinance as applied to plaintiffs' properties is a valid, reasonable legislative enactment bearing a relation to the public health, safety, morals and welfare.

The plaintiffs owned two contiguous parcels of property in the City of Park Ridge, referred to by plaintiffs as parcels A and B, located on the southwest corner of Devon Avenue and Canfield Road. Canfield Road is a four-lane north-and-south street, the center of which is the boundary line between Park Ridge and Chicago. Devon Avenue is a four-lane arterial street running westerly from Chicago through Park Ridge. Parcel A has a frontage on Devon Avenue of about 198 feet and 63 feet on Canfield Road. It is a vacant lot, while a one-story frame house and an unattached frame garage are on

lot B which has about 51 feet of frontage on Canfield Road and a depth of 185 feet. Parcel B is located south of and immediately adjacent to parcel A.

Parcel A is owned by United Consumers Service, who acquired their interest on September 6, 1956; parcel B is owned by John A. Roth and George Roth, brothers, who inherited their ownership through their mother's will which became effective in December of 1963. The Roths' parents had acquired the property in 1939.

In 1928 the City of Park Ridge adopted its original zoning ordinance under which parcels A and B were classified within the "D" Commercial District which permitted the properties to be used for gas stations. On July 2, 1957, the zoning ordinance was amended, and as a part of that amendment a "DD" Commercial District was created which applied to both parcels A and B. This classification allowed the properties to be used for nondrive-in commercial purposes, but precluded their being used for gas stations.

The existing commercial enterprises in the area under consideration are the following: On the northeast corner of Devon and Canfield, a retail drug store, a medical building, an architect's office, a personnel agency, a real estate office and a beauty salon; on the southeast corner is a Sinclair gas station. These are all in Chicago.

On the northwest corner of Devon and Canfield are a Dairy Queen with limited parking in the rear, a wig and beauty shop, a restaurant, a grocery and a meat market, all in Park Ridge. Talcott Road, a diagonal street running southeasterly, is one block south of Devon, at the northeast corner of which a gas station was formerly located but has been removed. On the southeast corner are a drug store, office, bakery, food store, delicatessen, cleaner's shop, dress shop,

hardware store and a restaurant. The Yost Office Building, a parking lot with two stores and a basement are on the northwest corner, and on the southwest corner are a real estate office, barber shop, beauty shop, gift shop and a medical building. The remaining properties in the surrounding areas in both Chicago and Park Ridge are single-family homes.

On October 19, 1965, under a contract agreement, the Humble Oil and Refining Company agreed to purchase parcels A and B for a combined price of $61,500, less $1,700 for costs. The condition of the agreement, however, was that the plaintiffs obtain a zoning change or an order of court which would permit the construction of a gas station on the combined parcels.

Adam Miller testified for the plaintiffs that he owns a portion of the subject property, having purchased parcel A for full consideration in 1956, and that at the time of the purchase he intended to erect a Texaco service station on the land. That deal was never consummated and Miller then planned to erect his own station, but his application for a permit was refused by the Park Ridge officials on the ground that under the amendment to the zoning ordinance a service station would not be permitted on the subject property. Miller further testified that the parcel has been idle from that time, even though he had turned the listing over to a realtor to try to sell the land under the new "DD" zoning. He said there were no offers except from other oil companies which wanted the property for service station use.

John Roth, a co-owner of parcel B, stated that the parcel had been listed for sale with a real estate broker since 1963, but no purchasers had been found except for the conditional sale negotiated with the Humble Oil Company.

Joseph Benson testified that he had served for 12 years as a real estate salesman for Standard Oil Company, and has been employed for the last 10 years in the real estate acquisition department of Humble Oil. He testified that the subject site had been chosen by Humble Oil in 1964 because it was well suited for use as a gas station site. He further stated that if the erection of a gas station were permitted through a contract with Humble Oil, it would have all service type repair work done inside and the building would be designed to have only light work done there.

John Lieb, who was a construction and maintenance engineer with Humble Oil for 16 years, had spent the last seven years with that company in constructing service stations. He identified a set of plans prepared under his supervision for the construction of a service station on the subject property. He testified that the proposed station would be ranch style with $70,000 worth of improvements, including effective drainage and trash enclosures.

Joseph Adduci, the superintendent of rating for the Illinois Inspection and Rating Bureau, testified that the Bureau rates fire insurance for the State of Illinois, and that a service station built according to the plans would have no effect upon the insurance rates of the surrounding properties. He further testified that under the "DD" classification there were uses permitted on the site which would have an equal or higher rate than that which would be imposed on the proposed gas station.

Ralph Martin, a licensed Illinois real estate broker with transactions involving residential, industrial and commercial properties, also testified for the plaintiffs. He had made an appraisal of the subject property for Humble Oil, and he testified that since he made the appraisal he had re-examined

the site, adding that he has been familiar with the development of the intersection for ten years. It was Mr. Martin's opinion that the property as currently zoned is worth $34,000, while if zoned for service station use, it would be worth $65,000. He stated: "It is my opinion that the subject property should be zoned for a service station. This is the highest and best use of the subject property." He was also of the opinion that the proposed use of the property as a service station would have no deleterious effect on the safety, health, morals or welfare of the community. He pointed out that since the other three corners have developed commercially, if there was any adverse effect it would already have taken place. Mr. Martin stated: "There is a considerable difference in what the evaluation of a given site is if it can be used for a service station . . ." At another point the witness noted that ". . . this type of property, zoned DD Commercial, has a value in the neighborhood of $1.50 to $2.00 a square foot, or in the neighborhood of $3.00 a square foot. Some has sold for $2.75, some has sold for $3.25, depending on the size, the depth, the shape of the properties. They are not always rectangular in shape and all of these factors indicate to me that the fair market value as zoned DD Commercial is $300.00 per front foot, . . ." The figure of $300.00 per front foot is equal to about $1.50 per square foot.

George H. Kranenberg, a planning and zoning consultant, testified that under the existing "DD" classification many heavier commercial uses could be put into operation on the property than the proposed use, although in his opinion the allowable heavy commercial uses "are not suitable for development on this site." He testified that in his opinion a service station would not have a detrimental effect on the

area, especially since one service station already exists across the street. On cross-examination the witness stated that the gas station across the street was an example of spot zoning, but he felt that placing a gas station on the subject site would not be spot zoning since it would only be the continuation of an already existing pattern. He testified that in his opinion the site could not be used for a shopping center since there is not enough area available for such a development. He said, "I do not think that you are going to get any use other than a service type use at this location . . ."

In behalf of the defendant Frederick Carlson, an appraiser and broker in Park Ridge, testified that he had compared the subject property with another site which had been sold in April of 1966 for $67,000 to a Cadillac agency in Park Ridge. Although that property was slightly larger than the subject site, Mr. Carlson believed that the subject property was a more desirable piece of land because it is rectangular in shape and consequently could be more easily developed. He testified that the present value of the subject property was $57,500, or $2.70 per square foot. He said he felt the highest and best use of the property would be a 2-story office building with 11,200 square feet of floor area and 10,000 square feet of rentable space, producing a gross rental of $50,000 a year. He estimated that such a building would cost $270,000, including the cost of the land, demolition of present property, preparation and surfacing of a parking lot, and the construction of the building. He said he was familiar with the Yost building one block south of the subject site, which was rented and bringing in $5.00 per net rentable square foot. This figure served as the basis he used in calculating the gross income for the proposed office

building on the subject property. Mr. Carlson was also of the opinion that if a service station were placed on the property the three single-family residential parcels bordering on the subject property would each suffer a loss of $1,000, whereas if an office building were erected there would be no detrimenal effect upon the surrounding residential properties. He expressed the opinion that the value of the property under the "DD" zoning was $57,500, no matter what use was made of it. He stated that he had been approached within the past ten days by someone interested in purchasing the parcels for office use.

Carl Gardner, a city planner and zoning consultant, testified for the defendant and stated that he felt there were no uses in the "DD" category which would "have the burdensome impact upon surrounding properties that an automobile service station would have." He stated that the Sinclair station on the southeast corner of Devon and Canfield was an example of spot zoning, and it was his opinion that to allow a service station on the subject property would constitute an expansion of the spot zoning which would be detrimental. He believed that the highest and best use of subject property would be a modern 2-story office building.

George Wundsam, acting building commissioner for Park Ridge, testified that office building permits had been issued to those interested in erecting such structures in "DD" zones, and that if all code requirements were met a permit would be given for an office building on the subject property.

The trial court found for the plaintiffs, and in this court the plaintiffs urge that the trial court's findings be sustained on the ground that the zoning ordinance as amended is an arbitrary and unreasonable legislative classification. There is no question that the passing of an amended zoning

ordinance such as the one in question before us is a legislative function of the municipality, and as such is entitled to a presumption of validity. Lapkus Builders, Inc., v. Chicago, 30 Ill. 2d 304, 309; Elmer Clavey, Inc. v. City of Highland Park, 75 Ill. App. 2d 464, 468. However, it is also the law that a municipality in exercising its legislative functions cannot act arbitrarily or unreasonably, and if the plaintiffs can show by clear and convincing evidence that the legislative act as applied to them is unreasonable and without substantial relationship to the public health, safety, morals or welfare, the presumption of validity will be deemed overcome. Bennett v. City of Chicago, 24 Ill. 2d 270.

It has often been stated that each zoning case is to be determined on its own facts and circumstances. Davis v. City of Rockford, 60 Ill. App. 2d 325; Krom v. City of Elmhurst, 8 Ill. 2d 104. However, there are existing guidelines. As stated in Davis, at page 329:

> ". . . zoning cases must be determined on the particular facts and circumstances of each case taking into consideration the character of the neighborhood, the general zoning pattern of the community, the decrease in property values, and the benefit to the community as compared with the hardship on the individual owners. [Citing cases.]"

The defendant argues that the amended zoning ordinance merely conformed the zoning code to the existing uses of the surrounding properties; in particular, that there are no drive-in uses in the area on the Park Ridge side, although the Dairy Queen closely approximates such a use. The defendant argues that the Sinclair station on the Chicago side of Canfield Road should not be accorded weight in assessing the uses in the area since that station is spot zoned, and is an aberration from the zoning pattern.

The defendant concludes that imposing the "DD" classification only prohibited future uses of the subject property and that no changes were necessitated by imposition of the category on parcels A and B. From a technical standpoint this statement is true, but we feel that such a view of the problem is unjustifiably narrow. Plaintiffs are not suggesting that as a result of the amendment they will be compelled to tear down a structure already on the property; rather, they are saying that they should be entitled to erect a structure which would have been allowed under the zoning code as it existed prior to the 1957 amendment. It is borne out by the evidence that one of the plaintiffs in particular purchased the land with the intent of having a service station erected on the property—a use which was unquestionably justified under the zoning ordinance existing at the time of the purchase. It is a fact that a conditional contract with the Humble Oil Company is currently being considered, and that Humble Oil has promised to purchase the property for $61,500, providing it can be used for the purpose of erecting a gas station.

Although one witness for the defendant testified that he had been contacted regarding the purchase of the property for use as an office building, it does not appear from the record whether the inquiry was serious. On the other hand, plaintiffs testify that they have had the property listed for sale for years and the only offers received were from oil companies interested in purchasing the land for use as a service station.

Concerning the already established character of the neighborhood, it is a matter of record that the other three corners at Devon and Canfield are all commercially developed. The defendant contends that the erection of a service station would cause a decrease in value of $1,000 each to three homes; how-

ever, it is interesting to note that there was no testimony in the record from any of the homeowners in the area, nor, apparently, was there any protest.

The plaintiffs' witness, Ralph Martin, testified that under the current zoning the property in question was worth $34,000, while if it could be used for gas station purposes it would be worth $65,000. The defendant attacked the witness' method of arriving at the figures and suggested that in establishing the value of the property as now zoned he should have used a figure somewhere in between the high and low which he himself had indicated. Defendant would have this court use an average of the high and low figures and value the property at $56,250 instead of $34,000 as suggested by the witness. However, the plaintiffs' witness testified that he believed the highest and best use of the property was for a service drive-in station, and that his figures were based on that fact.

The defendant's witness, realtor Frederick Carlson, testified that the property as zoned is worth $57,500, and that consequently, the plaintiffs had suffered no substantial economical loss as a result of the amendment to the zoning code, since the Humble Oil offer was for $59,800, after costs were subtracted from the purchase offer. This testimony was based upon a comparison with the Cadillac agency property which, as the witness testified, had dissimilarities to subject property.

Carlson also testified concerning the possibility of an office building being erected on the site, which testimony was intended to support defendant's contention that plaintiffs could erect a profit-making structure other than a service station. In regard to that testimony we must take into consideration the testimony of plaintiffs that when the land was turned over to a realtor for sale there had been no potential

purchasers other than the companies interested in using the site for a gas station. Furthermore, Carlson stated that the total cost of an office building would be about $212,500 over and above the cost of the land. Plaintiffs' witness testified that the total cost of erecting a gas station would be about $70,000 over the cost of the land, a difference of $140,000. There was no showing that a purchaser could be found who would erect such an office building.

The defendant argues affirmatively that the amendment is beneficial to the public health, safety and welfare. The basis of such assertion is that the proposed use of the subject site as a drive-in gas station would necessitate strong lights, long hours, potential traffic hazards, fumes, garbage and refuse in close proximity to residences.

The general theme of the testimony for plaintiffs was that the erection of a service station would have no adverse effect on the community since the other three corners are developed commercially, as well as the intersection immediately south. Furthermore, plaintiffs' witnesses explained the precautions which would be taken to minimize any potential deleterious effects, emphasizing that a gas station already exists directly across the street from the proposed site. The fact that that station is located within the boundaries of the City of Chicago does not require this court to close its eyes to the manner in which the intersection is developed.

Zoning and uses of property in close proximity to that under consideration should be taken into account in determining whether or not the legislation is in accord with the character of the area and the existing uses. LaSalle Nat. Bank v. Village of Palatine, 92 Ill. App. 2d 327; Berger v. Village of Riverside, 69 Ill. App. 2d 148. The defendant would make an

exception to the rule on the ground that the Sinclair station is a case of spot zoning and that the exception made for its erection should not be extended to allow the erection of a gas station on the subject property. We must consider the fact that the development of the intersection in question was of a commercial nature. It would appear that the erection of a service station on the proposed site would not be spot zoning. Even if it were, it cannot be said under the facts of this case that that alone would preclude plaintiffs from relief which they seek. Considering the fact that substantial financial harm to the plaintiffs would be incurred without corresponding benefit to the community, the municipality should not be allowed to amend out of existence that which had previously been permitted. The amendment which denies plaintiffs the right to erect a service station does permit other commercial and manufacturing uses, and it is hard to see how many of the objections aimed at the proposed service station would not apply with equal force to many of the allowed uses. A restaurant is likely to have more refuse of an objectionable nature than a service station, and a grinding shop would create as much noise, if not more, than a service station.

Ownership of plaintiffs' parcels predated the 1957 amendment. Before that the ordinance permitted service station use on the property. The intersection is already commercially developed and one gas station is located across the street from the subject site. Attempts to sell the land for development other than the erection of a gas station have failed. The combination of these factors overcomes the presumption of validity which attaches to the ordinance.

We hold that the trial court properly decided that the amended zoning ordinance as it applies to plaintiffs' prop-

erties is an unreasonable and invalid legislative enactment, and as such is unconstitutional insofar as it prohibits the erection of a gas service station upon the subject property.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

V 113 page 276

113 I.A. 2nd 276

53402

ALLEN S. KLEPPINGER, Plaintiff-Appellant, vs. ETTA NELSON, Administrator, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Lester Jankowski Presiding.

MR. PRESIDING JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

The plaintiff appeals from a judgment of the Circuit Court of Cook County, First Municipal District, entered on a directed verdict in favor of the defendant. Magnus Nelson was originally the defendant herein, but prior to trial, notice of his death was given and his administrator substituted as defendant. The plaintiff appeared pro se in the trial court and also on this appeal.

On May 30,1962, an accident occurred on the Edens Expressway in the City of Chicago, between two vehicles, one driven by the plaintiff and the other by Magnus Nelson. Plaintiff's witness, Daniel Taylor, a passenger in the plaintiff's automobile, testified that plaintiff was driving approximately thirty to forty miles per hour in a southerly direction when his automobile was struck in the rear by defendant's car, causing extreme damage to the rear portion of plaintiff's automobile. Plaintiff originally alleged personal injuries and property damage in his complaint, but on November 26,1965, the personal injury count was dismissed by order of the court on stipulation of the parties.

The defendant's theory of the occurrence, as declared in his opening statement to the jury, was that plaintiff was driving

about two lanes to the left of the defendant when plaintiff's automobile sustained a flat tire, and at that point turned to the right, coming into the lane of traffic where defendant was driving, thereby causing collision of the two vehicles. The plaintiff denied his automobile had received a flat tire, and Mr. Taylor testified that no flat tire had been sustained by the plaintiff's automobile.

The plaintiff attempted to introduce into evidence several documents and photographs of his damaged automobile, yet due to his failure to lay a proper foundation for the introduction of such exhibits, the trial judge sustained the defendant's objection The extent of the plaintiff's evidence was the testimony of Mr. Taylor, and upon the motion of the defendant for a directed verdict, the trial court sustained such motion, instructing the jury to return a verdict in favor of the defendant.

On appeal the plaintiff raises several arguments pertaining to the rulings of the trial court concerning the introduction of evidence, the plaintiff's scope of examination of his witness and the extent of his personal injuries sustained in the accident of May 30,1962. Upon close examination of the record, we find the rulings of the trial court were correct. The objection by defendant to the introduction of the photographs and documents sought to be placed in evidence was properly sustained due to the plaintiff's failure to lay a proper foundation. The line of questioning employed by the plaintiff to his witness was improper and the objections made by the defendant were properly sustained

by the trial judge. The constant referral by the plaintiff to the injuries he sustained in the accident were properly objected to and sustained since the personal injury claim had been dismissed on stipulation of the parties through their attorneys on November 26,1965. (At this time the plaintiff was represented by counsel who withdrew from the case on January 9, 1968, shortly before the trial commenced.)

This court is mindful of the fact that the defendant has filed a motion to dismiss this appeal, to strike the plaintiff's brief and record,and to file a supplemental record. Said motion has been taken with this case. Due to our holding in this case, that there was no abuse of discretion on the trial judge's rulings, we find it unnecessary to discuss further the motion submitted by the defendant.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

(Abstract Only)

MURPHY, J., and BURMAN, J., concur.

113 page 32c

113 I.A. 2nd 320

52380

JOSEPH DOROCKE and MARIE DOROCKE, Plaintiffs-Appellants, vs. HARVEY FARRINGTON, et al, etc., Defendants-Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY Honorable Daniel A. Covelli Presiding Judge

MR. JUSTICE SMITH DELIVERED THE OPINION OF THIS COURT:

The plaintiffs appeal from a judgment of the trial court denying them compensation on a quantum meruit basis for services rendered a decedent in his lifetime. The judgment, it is said, is contrary to the manifest weight of the evidence. This is the second trip for this case to this court (Dorocke v. Farrington, 43 Ill.App. 2d 394, 193 N.E.2d 593). On the first appearance, this court affirmed a decree finding that the plaintiffs had failed to prove an express contract and that it was error to deny them the right to file a claim on quantum meruit. The case was remanded to the trial court with directions to grant leave to the plaintiffs to file a count in quantum meruit, permit the defendants to file an answer, and grant both parties the opportunity to present evidence on the issues so joined. This they did and it is back again on the limited issue of whether the judgment now entered is against the manifest weight of the evidence.

Mrs. Dorocke had been a patient of Dr. Farrington, a homeopathic physician, for about four months and their families had been friends for years. After the death of Mrs. Farrington, Mr. and Mrs. Dorocke and their son moved in with the doctor and they lived pretty much together as a single family with Dr. Farrington furnishing the utilities and the house rent free and the Dorockes furnishing the food, household work and general care of the lawn. Apparently at the beginning the plaintiffs also paid for half of the utilities, but this practice was abandoned after about six months. This arrangement continued from May 25, 1951, to June 10,

1956, and this is the period of time covered by the complaint for services rendered. The Master in Chancery basically found that whatever the arrangement may have been between the parties, it was on a basis of mutual satisfaction for both, both mutually benefited by it and that it ought to remain that way.

There is evidence in the record that the house furnished by Dr. Farrington had a rental value of $175.00 per month, but that the real estate broker who so testified said he had no idea what its rental value was during the five years here involved. A witness testified on behalf of the plaintiffs that she was engaged in operating an agency furnishing household help and that the reasonable value of the services of the plaintiffs over and above a credit for living in would be $50.00 per week. This testimony is in the face of testimony of Dr. Farrington that he previously paid a housekeeper $35.00 to $40.00 per week. The testimony of the witness operating the agency providing household help seems to us to be of very little value for the very simple reason that these people were not employed as domestic servants and the evidence has little probative value. The plaintiffs did sell their home and they and their son came to the doctor's home. This saved them the necessity of a trip to the doctor from their home in Wheaton and further provided someone in the home with Mrs. Dorocke. It is clear that the doctor had been treating her for menopause complications bordering on suicidal activity and that he furnished her with homeopathic remedies for which she paid him. There is no evidence that the doctor rendered any medical service other than this. Dr. Farrington testified that the services of these people were quite satisfactory.

The evidence further shows that during June, 1955, the plaintiff-husband directed a letter to the doctor from Ft. Wayne in which he said, "When you told me last night that you were planning on having your estate put in order and had consulted a lawyer friend of yours. . .we feel that this was the proper thing to do, and were hoping that you would not forget us in the necessary

papers that your lawyer friend would have to prepare. . ." This letter, written by the plaintiff-husband, makes no reference to any agreement to give them a break on the sale of the property at two-thirds its value nor does it suggest in any way that the doctor was indebted to them for services rendered either as a result of an express contract or an implied contract. In fact its very tenor is that of seeking a gratuity even though plaintiffs' testimony was "that they were not asking for anything gratuitous".

[5] In the previous appeal, the court definitely held that there was insufficient evidence to establish an express contract. We have reviewed the testimony and conclude that the arrangement which was entered into at the time was the one carried out by both parties, i.e., that the plaintiffs and their son would occupy the house rent free, and that the doctor would be provided with the necessities of life so far as food and attention were concerned. They lived on the basis of a family unit. They sold their home and moved in. The evidence does not indicate specifically that they sold their home at the doctor's request. It appears that Mrs. Dorocke had been going to Dr. Farrington about four months before this suggestion was made by him to her. There was never any request for remuneration for taxi hire, there was never any request for any remuneration for services rendered over and above what he was then furnishing them. What prompted the suit against the doctor prior to his death is not shown by this record. Be that as it may, we cannot say that the finding of the Master in Chancery that this was a mutually satisfactory arrangement on the part of all and that all were happy and satisfied is against the manifest weight of the evidence. The doctor had the use of a bedroom, his office and a downstairs bathroom. The plaintiffs had the use of a bedroom and bathroom upstairs and all parties had the use of the living room and dining room. The record shows that the doctor furnished homeopathic remedies to Mrs. Dorocke, that she had consulted at least three other physicians for her ailment, and that Dr. Farrington's professional services were actually limited to the homeopathic remedies for which he was paid.

In determining the previous appeal, the plaintiffs suggested that the Appellate Court should permit an amendment to the pleadings to conform to the proof then before it and should render a judgment for the plaintiffs in quantum meruit. The first appeal, 43 Ill.App.2d 394, 193 N.E.2d 593, rejected this theory stating at p. 400:

> "We think that the defendants should have an opportunity to present their evidence on this issue. For this reason further hearings should be held to determine the value of services, if any, above the benefits derived by plaintiffs and their son from living in the Farrington home and the value of the professional services rendered, if any, by Dr. Farrington to Mrs. Dorocke." (Emphasis added).

The plaintiffs' suit in the first instance was based upon the theory that by deeding his property to his attorney, Dr. Farrington had breached an oral contract to sell the property to them. The Appellate Court held that they did not prove such a contract. It correctly held that this failure did not preclude a right to proceed on the theory of quantum meruit. However, the court further stated in such a situation the plaintiffs should be allowed to "establish the value of their services, if any, above the rent free occupancy and other benefits of living with the doctor". We have read with considerable care the testimony in this case. The burden of proving the value of their services over and above other considerations by them received rested with the plaintiffs. The record shows that originally they paid one-half of the utilities. Some six months after they moved in they complained of this as being too much and they were excused from that part of the original arrangement. It is clear from this record that the plaintiffs were not hired as domestics and testimony relating to that type of service is of little benefit on the question of the value of plaintiffs' service. The plaintiffs complained about paying the utilities. In the letter from Ft. Wayne, there was a hopeful expression on the part of the plaintiffs that the doctor might remember them. Under these circumstances, we cannot say that the Master in Chancery or the Chancellor was in error in

his conclusion that the arrangements so made and carried out were mutually satisfactory and that it should remain that way. They were living in this home rent free and with all utilities furnished. Neither the rental value nor the value of the utilities is shown in this record. It would be pure speculation to fix an amount for services rendered from the evidence in this record. Whether the benefits received by plaintiffs were greater or less than the services rendered by them is pure speculation. It is thus clear that the plaintiffs have not sustained the burden of proof nor have they followed the directive dictated by this court on the first appeal. We cannot say that the finding of the trial court is against the manifest weight of the evidence. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Trapp, P.J. and Craven, J. concur.

No. 52835

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RICHARD A. MARTIN and HAWTHORNE CLEANERS, INC., an Illinois Corporation, Plaintiffs-Appellees, vs. DONALD O. VAN NESS, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Municipal Department. Honorable Wallace Kargman, Judge Presiding.

EBERSPACHER, J.

This action was brought by an individual and a corporation to recover damages for an alleged breach of an express warranty. The warranty was contained in a written agreement whereby the individual plaintiff, Richard A. Martin, agreed on behalf of "a corporation to be formed" to purchase the entire partnership interest of his co-partner, Donald O. Van Ness, the defendant herein. The trial court, without a jury rendered judgment for the corporate plaintiff only against the defendant. The defendant has appealed from such judgment.

It appears from the record that in November of 1962 the plaintiff and the defendant entered into an oral partnership to operate a cleaning business. Each partner was to contribute half of the partnership capital; profits and losses were to be shared equally. The agreement further provided that the defendant was to have charge of production and management and the plaintiff was to have charge of advertising and administrative duties, including the fiscal affairs as a comptroller. The plaintiff, an accountant by profession, who specialized in auditing for dry cleaning firms, was also to keep the partnership books and did so until May, 1964, when the partners agreed to permit various employees to keep the books; however, plaintiff admits that

he was never refused a chance to look at the books and records of the partnership, but did not do so until May of 1966, after the agreement which had been entered into in April 1966.

The partnership continued until April of 1966, when the partnership was dissolved. On April 27, 1966, the parties executed a document entitled, "Agreement to Purchase Partnership Interest" whereby "Richard A. Martin, as agent for an Illinois corporation to be formed to be known as Hawthorne Cleaners, Inc.," agreed to buy the entire partnership interest of the defendant for $19,250.00.

By the terms of the Agreement, the defendant conveyed to Hawthorne Cleaners, Inc., all of his right, title and interest in the partnership business and partnership assets.

The Agreement also contained a recital which is the basis of this action, whereby the defendant as First Party covenanted as follows:

> "WHEREAS, First Party represents and warrants that no disbursements have been made out of the partnership funds and no obligations have been incurred which are not reflected in the books and records of the partnership or are not ordinary disbursements or obligations of the partnership in the ordinary course of the partnership business."

At the time the Agreement was executed, and for well over a year before that, a dispute involving $2,800.00 had existed between the parties arising out of a separate and distinct partnership in which the parties were engaged known as Square Laundry. A payment of $2,800.00 on the purchase price of Square Laundry was due and there were not sufficient funds in the business to make the payment. Defendant contending that he had made his capital contribution to Square Laundry, advanced $2,800.00 to make the payment. Plaintiff maintains that the $2,800.00 was due as defendant's capital contribution to that business. Subsequently Square Laundry was sold and the proceeds put into Van Ness Cleaners.

On March 31, 1966, the defendant withdrew $2,500.00 from the partnership in an apparent effort to equalize the capital contribution of the parties. On April 13, 1966, in an unrelated transaction the defendant caused the partnership to pay the sum of $1,500.00 to Des Plaines Master Crafts Furriers and Cleaners. The plaintiff

in his complaint alleges that these two disbursements totaling $4,000.00 were not the obligations of the partnership business incurred in the ordinary course of the partnership business and were disbursements in breach of the representation and warranties of the defendant as contained in the paragraph of the written agreement set forth above. There is no question but that the two transactions were accurately reflected in the books of the partnership. In the negotiations for the sale, which led to the agreement, defendant's $2,500.00 withdrawal was taken into consideration.

The plaintiff's theory is that the defendant made two separate warranties, namely: (a) no disbursements have been made out of the partnership funds and no obligations have been incurred which are not reflected on the books and records of the partnership, or (b) are not ordinary disbursements or obligations of the partnership in the ordinary course of the partnership business. Accordingly, the plaintiff asserts that if either warranty is violated there is a breach of contract.

This theory was apparently accepted by the trial court and was the basis of the judgment entered herein.

The defendant argues that the defendant warranted only that all disbursements or obligations were either (1) reflected in the books and records of the partnership, or (2) were ordinary disbursements or obligations of the partnership in the ordinary course of the partnership business, not both.

It is our opinion that the proper construction of the language of the covenant requires the reversal of the judgment. The covenant provides that "no disbursements have been made out of partnership funds and no obligations have been incurred which..." and is then followed by the two phrases, (1) "are not reflected in the books and records of the partnership", (2) "are not ordinary disbursements or obligations of the partnership in the ordinary course of the partnership business". The latter two phrases are separated by the word, "or" which in its normal useage indicates an alternative between two or more words, phrases or clauses. "Webster's New Twentieth Century Dictionary Second Addition, Unabridged 1960", defines the word, "or" as a "co-ordinating conjunction introducing an alternative. . . ."

To same effect see Marshall Field vs. Fued, 191 Ill. App. 619 (1915); Central Standard Life Insurance Co. vs. Davis, 10 Ill. App. 2d 245, 134 N.E. 2d 653 (1956).

Accordingly, the defendant warranted in the alternative, i.e. that there were no disbursements or obligations which were not either reflected in the books and records of the company or made in the ordinary course of business. Since the evidence is undisputed that both transactions were reflected in the books and records of the partnership, the defendant has made no breach of his warrant.

The plaintiff's citation to cases which have held that the word, "or" can be construed to be "and" when to give "or" its ordinary meaning would be to produce a result that would be absurd, is without merit in light of the obvious reason for the inclusion of such provisions. The presence of liabilities and disbursements on the books and records of the business is adequate protection against undisclosed liabilities. The prospective purchaser may examine such books and records to determine its financial condition. However, in recognition of the fact that there may be transactions which are not shown in the records the additional safeguard is provided that as to these they must be made in the normal course of business. To interpret the covenant otherwise would require the seller at some future date to prove (a) that every transaction of the business since its inception is accurately reflected on the books, and (b) that every transaction of the business since its inception was done in the normal course of business; a burden which no seller would bargain for or assume.

Accordingly, it is our construction of the covenant that the defendant made alternative warrants and since there is no dispute he has fullfilled the first, the judgment will be reversed.

Judgment reversed.

CONCUR: /S/ Joseph H. Goldenhersh

CONCUR: /S/ George J. Moran

V 113 [illegible] 36

53382 **113 I.A. 2nd 363**

JOSEPHINE ERCOLINO and VINCENT ERCOLINO, Plaintiffs-Appellants, v. HARRY JAFFE, Administrator of the Estate of LEONARD LIEBERMAN, deceased, Defendant-Appellee	APPEAL FROM CIRCUIT COURT OF COOK COUNTY Honorable David A. Canel Judge Presiding

MR. JUSTICE CRAVEN DELIVERED THE OPINION OF THE COURT.

A personal injury action brought by a pedestrian and her husband for injuries received by the wife at Jackson Boulevard and DesPlaines Street in Chicago on January 17, 1963, resulted in a jury verdict and judgment for defendant.

Plaintiffs appeal, claiming error in the rulings of the trial court preventing the plaintiff-pedestrian from testifying that a purported eyewitness who testified was not seen by her at the accident scene on the basis of the Dead Man's Act, error in permitting certain exhibits of defendant to go to the jury room, and alleged prejudicial comments and rulings of the trial court during the cross-examination of a witness for plaintiffs.

Plaintiff Josephine Ercolino, a pedestrian, crossing Jackson Boulevard at the crosswalk, apparently walked in front of a C.T.A. bus and was struck by a car driven by Lieberman and knocked down. She suffered severe and permanent injuries, and brought suit. Her husband, Vincent Ercolino, sued for loss of consortium. Two eyewitnesses testified, Joseph Coppoletta called by plaintiffs, and Justo Prado called by defendant. The driver of the car, Leonard Lieberman, has since died and the suit was against the administrator of his estate.

Joseph Coppoletta, called by plaintiffs, testified on direct examination that he first saw plaintiff Josephine Ercolino on the southwest corner of Jackson and DesPlaines at the crosswalk; that there was a C.T.A. bus there; that the light turned

green for people crossing Jackson and she started walking across; that there were four or five lanes on Jackson; that he heard brakes squeal and a car hit her; that she was knocked down and "fell a little east of the sidewalk" where Coppoletta was, after having crossed three lanes; that she was hit by a car in the lane nearest the north curb; and that the car stopped ten or fifteen feet past the curb.

On cross-examination this witness testified that the light turned green from amber or yellow when he saw plaintiff cross the street.

This witness, on evidence depositions prior to trial, had testified that he first noticed Josephine Ercolino "when she was struck and went up /in the air/" and that he did not notice the color of the traffic signal at the time of the accident. At the trial he testified that if he ever gave any testimony different from his testimony at the trial, the other testimony was incorrect as his recollection was better at the trial than when his earlier statement was taken. He further testified that he had given plaintiffs' attorney a report of the accident from his testimony at the trial; that he had known plaintiffs for a long time prior to the accident; and that he had gone to the office of plaintiffs' attorney prior to his deposition by car, while at another place in his testimony he said he had gone there by train.

Justo Prado testified as an eyewitness for defendant. He testified that he was a quarter of a block from the accident; that he saw plaintiff at the rear of a bus stopped at the Jackson-DesPlaines intersection; that plaintiff Josephine started across the street, from behind the bus, running south to north; that when she started running the light was green for Jackson and still was green when she was half-way across the street; that she continued running and the car hit her; that the accident was in the third of four east-bound lanes on Jackson, counting from the south curb. He said the car was going fifteen or twenty m.p.h. and reduced its speed and put on its brakes.

Under the state of the evidence in the record, we cannot say that the verdict for the defendant is against the manifest

weight of the evidence. This clearly was a question of fact for the jury. The evidence of Coppoletta was impeached so that it became a question for the jury as to the weight to be given his testimony.

Plaintiffs complain that the court erred in not permitting plaintiff Josephine Ercolino to testify in rebuttal that she did not see Justo Prado at the scene of the accident as proof he was not there. This would have been negative testimony and not conclusive. Other witnesses were present who could have identified this witness. In any event, at best, it would have had little or no probative value.

Plaintiffs contend that section 2 of the Evidence Act (Ill.Rev.Stat.1967, ch. 51, sec. 2), commonly referred to as the "Dead Man's Act", which was the basis of the court's refusal to permit plaintiff Josephine to so testify, is unconstitutional and offends our sense of justice and should not have been used to refuse this testimony. It is not within the province of this court to rule on the constitutionality of this statute. If plaintiffs wish to urge this issue, they should have appealed to the Supreme Court on that basis. Moreover, the purpose of this Act has been stated as being to put both parties to a lawsuit on equal footing. One party to a transaction or event has been silenced by death and the other is silenced by this law. The "fairness" sought by plaintiffs is in reality an advantage for the surviving party. It is not for us to determine a change in policy in this area. That policy question is for the Legislature.

Error also is urged by reason of the court's permitting defendant's Exhibits 3 and 4 to be taken by the jury to the jury room. These exhibits were records of the Bureau of City Traffic of the City of Chicago showing the timing operation of the traffic lights at the intersection on the date of the accident. A witness had testified that the yellow signal would always be followed by a red signal and never by a green one. No objection was made to the admission of these exhibits into evidence, although objection was made to their going to the jury room. The question of what exhibits may be taken to the jury room is largely one for the trial court.

Mokrzycki v. Olson Rug Co., 28 Ill. App. 2d 117, 170 N.E.2d 635 (1st Dist. 1960). If there were objectionable matters in the exhibits, objections should have been made at the time they were offered so as to afford an opportunity to delete or correct the objectionable material. No such objections having been made, it was a matter within the discretion of the court as to whether these exhibits were to go to the jury room.

Finally, appellants contend that the comments and rulings of the trial judge were improper. No objection was made to these comments and plaintiffs made no offer of proof on the matters which they now seek to claim as error upon which the judge refused to permit further questioning. A party may cross-examine a witness for the purpose of credibility and may in so doing have a certain latitude as to questions on matters otherwise immaterial. The extent of such examination is largely in the discretion of the trial court. People v. Halpin, 276 Ill. 363, 114 N.E. 932 (1917). Admittedly, a trial judge must not make comments which mislead the jury as to the determination of questions of fact. However, the trial judge must be allowed a reasonable exercise of direction and general control over the conduct of the trial. Anderson v. Inter-State Business Men's Acc. Ass'n, 354 Ill. 538, 188 N.E. 844 (1933). Where the trial judge, as here, shows impatience with the time consumed by questioning upon trivial matters, this is not to be regarded as expression of an opinion on a question of fact so as to constitute reversible error. Katsinas v. Colgate-Palmolive Peet Co., 299 Ill. App. 347, 20 N.E.2d 127 (3rd Dist. 1939).

A reading of the record in this case convinces us that the jury returned a proper verdict under the evidence presented. No substantial error occurred which would require us, or even justify us, in reversing this verdict and judgment.

JUDGMENT AFFIRMED.

TRAPP, P.J. and SMITH, J., concur.

113 I.A. 2nd 415

53045

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. RUDY FAZ, SR., Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HON. FRANCIS T. MORAN PRESIDING

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Rudy Faz, Sr., was indicted for committing the offense of indecent liberties with a child (Ill. Rev. Stat., 1965, ch. 38, §11-4 (a-3)). The case was tried without a jury and after the trial court found the defendant guilty he was sentenced to the Illinois State Penitentiary for a term of three to eight years.

The defendant contends, on appeal, that the State failed to prove a material allegation of the indictment, to-wit, that the defendant intended to arouse and satisfy the sexual desires of himself or of his daughter. Defendant also urges that if his conviction should be affirmed his sentence should be materially reduced.

The record reveals that the complaining witness, Rosalinda Faz, the 13 year old daughter of the defendant, testified that on the morning of May 30, 1967, she and her brother went shopping with her father. The complaining witness said that they first went to a Walgreens Drug Store. While her brother looked at magazines, Rosalinda and her father went to the rear of the store. There the defendant told his daughter that when they got home he was going to give a little show for her mother. Rosalinda testified that when she asked her father what was going to happen, he merely said that she would find out when she got home. The complaining witness also stated that before the trio left Walgreens, she told

her brother that "we were going to get beat up when we got home because I didn't think I could talk to my mother when we got home."

The defendant and his two children next went to Goldblatt's. The brother bought a pair of pants and then the three returned home.

Rosalinda further testified that when she got home she told her mother not to object to anything her father might do. The complaining witness also stated that when her brother tried on his new slacks he discovered that they did not fit. The defendant insisted that her mother and her brother exchange the slacks. When her mother refused Rosalinda said that her father "got up and told her [Rosalinda's mother] he would bust her head in if she didn't take the slacks in."

After her mother and her brother went to exchange the slacks Rosalinda was left in the house with her Aunt and the defendant. Rosalinda said that the defendant called her into the kitchen and told her he was going to take her upstairs to show her something, "but he wouldn't if I would do what he wanted me to do, and I said no." So he took me upstairs. When they arrived in the attic the complaining witness said that her father showed her some booklets and pictures. The booklets and pictures depicted various sexual positions. She then stated, "He told me that he wanted me to do what was illustrated in these books because I had done it when I was younger and there wasn't anything wrong in it." After she looked at the pictures her father told her to go to her room. There the defendant told the complaining witness that she would "get more hell than this...and that he would get his way sooner or later, and that if he did get his way now ,that he wouldn't...give this little illustration to my mother." When asked what illustration she was referring to, the witness

answered, "He said he was going to show what my brother had done before to me, and I didn't know exactly what he was talking about ...." Rosalinda said that her father then left her room.

When her mother and her brother came home from Goldblatt's, the defendant summoned Rosalinda and her mother into the living room. The defendant told the complaining witness to sit on the arm of the chair in which he was sitting. While his wife and his son were watching, the defendant began to rub and squeeze Rosalinda along her thigh. She was told to stand up and illustrate how her father rubbed and squeezed her thigh. She said, "he was rubbing here, all around this area, and he was squeezing there, and he asked my mother if she objected to this, and she was repeating herself, what do you mean." She said the rubbing continued for about five minutes. Afterwards she ran into the bathroom and cut her wrists.

On cross-examination, the complaining witness testified that the defendant did not touch her in the attic nor in her bedroom. She also testified that the defendant told her to change into "knee knockers" (slacks cut off to the knees) and that he did not put his hand inside the "knee knockers" when he was rubbing her thigh.

Mrs. Doris Faz, the wife of the defendant, said that her husband started rubbing his hand up and down her daughter's leg and that he kept going up a little higher from her knee up to her hip. She stated that while he was doing this he kept saying, "If this is what you want, this is the way I am going to get my pleasure from now on."

Rudy Faz, Jr., the defendant's son, corroborated his mother's version of what occurred and stated that the defendant squeezed his sister's buttocks.

The defendant contends that he was merely dealing with an unruly daughter and perhaps a loose person who needed parental chastisement. He maintains that the evidence in the case at bar shows clearly that he wanted to give his wife and his son an example of the conduct of his daughter and that the evidence does not show that he intended to arouse and satisfy the sexual desires of himself or of his daughter.

We believe that the defendant's theory of the case overlooks some of the evidence, namely, the pictures depicting various sexual positions and the defendant's statements to his daughter concerning the way in which he would get his pleasure. The fact that there was no secretive assault, no privacy, no surreptitious doings of any kind does not persuade us that the requisite intent is absent in this case.

The defendant's claim that he did not intend to arouse and satisfy the sexual desires of himself or of his daughter was made by a defendant in People v. Gilmore, 320 Ill. 233, 150 N.E.631. The Illinois Supreme Court stated in Gilmore:

> While, as claimed by the defendant, crimes of this sort [the defendant was accused of taking immoral, improper and indecent liberties with an eleven year old child] are generally committed in out-of-the-way places...it is to be remembered that neither assault with intent to commit rape or intent to have carnal knowledge are elements of this crime, and the acts constituting this crime may undoubtedly be committed in the seclusion of a sedan,[1] with a child of tender years offering no resistance....

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[1] According to the evidence, the car in question was parked in the business section of the city, and the acts complained of are alleged to have taken place before 8 o'clock in the evening. In addition, people were constantly passing up and down the street and the street lights were lighted.

320 Ill. 233, 235, 150 N.E. 631, 632. The Court continued by saying that intention is manifested by circumstances connected with the perpetration of the offense and that it is a well-settled rule of law that every person of sound mind is presumed to intend the natural and probable consequences of his voluntary act.

In the case at bar, there is no dispute as to what actually occurred in the defendant's living room. The only question in the case concerns the defendant's intent. It is well-settled in Illinois that the intent with which an act was done is a question of fact. Crosby v. People, 137 Ill. 325, 27 N.E. 49. The Criminal Code intends to punish the attempt to take improper and indecent liberties with any child under fifteen with the intent of arousing, appealing to, or gratifying the passions or sexual desires of either party. The statute does not define specific acts which are punishable, but leaves it to the court or jury, as the case may be, to determine from all of the evidence and circumstances whether the conduct of the accused with a child may be termed immoral, improper, or indecent, and the intent with which the act was committed. People v. Kirilenko, 1 Ill. 2d 90, 115 N.E.2d 297.

In criminal cases it is the duty of this court to examine the evidence, and, if there is not sufficient credible evidence, if it is improbable or unsatisfactory, or not sufficient to remove all reasonable doubt of the defendant's guilt, the conviction is reversed. Under the facts and circumstances appearing in the record of this case, however, the finding of the trial court will not be disturbed.

The defendant also asks that if his conviction is affirmed that his sentence be reduced. After carefully reviewing the entire record in this case we cannot say that the sentence imposed

on the defendant is not proportioned to the nature of the offense he committed. Therefore, the sentence given the defendant will be left undisturbed.

For the foregoing reasons, the judgment of the Circuit Court is affirmed.

AFFIRMED.

ADESKO, P. J. AND MURPHY,

J. CONCUR.

(Abstract only)